IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN FIZER,
Appellant,
vs.
TURNBERRY TOWERS, L.P., A NEVADA LIMITED LIABILITY COMPANY; TURNBERRY WEST REALTY, INC., A NEVADA CORPORATION; AND TURNBERRY WEST, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

No. 45932

FILED

AUG 18 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Ribaudo
CHIEF DEPUTY CLERK

ORDER OF AFFRIMANCE

This is an appeal from a district court order granting summary judgment in a real property case. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.[1]

We review the order granting summary judgment de novo.[2] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[3] The pleadings and other proof must be construed in a light most favorable to the non-moving party.[4] But once the movant has properly

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[1]We have determined that this appeal should be submitted for a decision on the briefs without oral argument. See NRAP 34(f)(1).

[2]Wood v. Safeway, Inc., 121 Nev. ___, ___, 121 P.3d 1026, 1029 (2005).

[3]Id.

[4]Id.

06-17296

supported the summary judgment motion, the non-moving party may not rest upon general allegations and conclusions and must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial to avoid having summary judgment.[5]

Our de novo review shows undisputed facts that appellant Stephen Fizer entered into a June 3, 2001 contract with Madison Towers L.P. ("Madison") to purchase for $703,250 a penthouse condominium to be constructed at a project called Madison Towers. Madison Towers was to consist of 608 units in two 28-story towers but was never built as originally planned. Instead, it was announced in October 2004, that Turnberry Towers, with two 45-story towers, would be built at the Madison Towers location.[6] A Turnberry Towers condominium comparable to the one Fizer had contracted to purchase in Madison Towers was offered for sale at $1,000,000.

According to the parties' purchase agreement, Madison had the right to terminate the agreement and refund all of Fizer's deposits, "in which case both parties shall be released of all obligations hereunder," if Madison was "unable to obtain executed purchase and sale agreements for fifty percent (50%) of the units in the Condominium within 180 days from the date of the first purchase and sale agreement of a unit." Following the

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[5]Id. at ___, 121 P.3d at 1030-31; NRCP 56(e).

[6]The complaint alleges that Turnberry West, LLC ("Turnberry") is the developer and general partner of Turnberry Towers, L.P., formerly known as Madison Towers, L.P., and Turnberry's motion to dismiss concedes that Madison is its predecessor.

September 11, 2001 terrorist attack, Madison's sales substantially declined, and it sold approximately 100 units by the end of 2001. In February 2002, Madison contends, it decided to terminate its sales program, closed its sales office, and informed all buyers of the project's termination and gave buyers the choice of having their deposits returned or transferred to a different Turnberry project.

Fizer's affidavit avers that he instructed Madison to hold his deposit because he believed the Madison Towers project was suspended temporarily, as he was not told that the project was being cancelled. According to the affidavit, Fizer knew that Madison had the right under the contract to rescind after 180 days if it did not sell 50% of the condominium units. But Fizer claims that since Madison was "well past the sixth [sic] month deadline for rescission [he] anticipated that the project would go forward." Fizer interprets Section 8.4 of the purchase agreement as requiring Madison to cancel by 180 days of the first sale.

The clear and unambiguous language of Section 8.4 did not require Madison to terminate the purchase agreement within 180 days of the first sale. Instead, Madison had the option to terminate the contract if less than fifty percent of the units were sold within 180 days of the first sale. The 180 days applies only to a condition precedent, defining when Madison first had the right to terminate, and does not require Madison to actually exercise its termination right by that date.

Although the record does not reveal the date of the first sale, it is undisputed that by the end of December 2001, more than 180 days had passed from the time that Fizer signed his purchase agreement on June 3, 2001, and that only about 100 of the 608 units had been sold. As less than

fifty percent of the units had been sold, Madison had the right to terminate the purchase agreement.

Nevertheless, Fizer contends that he did not receive written notice of the contract's termination and that he was misled into believing that the project would be resumed. Fizer also argues that the letter that Madison provided to another buyer actually supports his contention that Madison intended to merely postpone and not cancel the project. This letter returned the other buyer's deposit and stated that Madison is "postponing the start of construction and suspending sales at Madison Towers until the economy strengthens. We apologize for this delay and hope that you will retain your interest when we reactivate the sales program."

Section 19 of the purchase agreement, which generally pertains to notices, does require notices to either party to "be given by certified mail, postage prepaid and return receipt requested, by hand delivery or a nationally recognized overnight carrier." But Section 8.4, giving Madison the right to terminate due to inadequate sales, only requires that Madison "refund all of Buyers' Deposits, in which case both parties shall be released of all obligations hereunder." No further notice is required in Section 8.4. The specific requirements of Section 8.4 are clear and unambiguous, and simply require all of the buyers' deposits to be refunded without the need for any additional notice in order to terminate the purchase agreement due to inadequate sales.[7] Consequently, Fizer's lack of notice argument fails as a matter of law.

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[7]See Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (stating that "[i]t has long been the policy in Nevada that absent some

continued on next page . . .

Additionally, Madison's Vice President of Sales averred that he caused all deposits to be returned to all Madison Tower buyers, including Fizer. Included with his affidavit was a copy of a March 26, 2002 check made payable to Fizer for his deposits totaling $70,325, which Fizer allegedly voided and returned to the escrow company. Although Fizer argues that Madison provided no proof that it mailed the checks to him, he does not dispute actually receiving, voiding and returning the check. Fizer also admits that he received a check on March 29, 2005, for $638.98, representing the interest on his deposit; while Fizer told the title company that he was not entitled to interest on his deposit, he averred that he still had the uncashed check in his possession. Thus, there is no genuine issue of material fact that Fizer's deposit was tendered to him by Madison, putting him on notice that the parties were released from their obligations to each other. Moreover, Fizer provided no evidence that he continued to perform under the contract by making a third deposit that was due on September 30, 2001, or a fourth deposit that was due on September 30, 2002. Accordingly, no material questions of fact exist with respect to whether the parties' contract was properly terminated with Madison's tender of the March 2002 check to Fizer, so that Fizer's breach of contract claim must fail as a matter of law.

And, although Fizer contends that Madison was unjustly enriched by retaining his deposits, the undisputed facts demonstrate that

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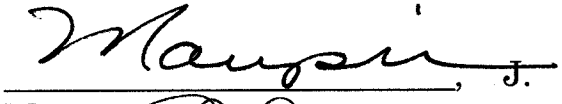
. . . continued

countervailing reason, contracts will be construed from the written language and enforced as written" and affirming the district court's summary judgment).

it was Fizer's decision—not Madison's—to keep Fizer's deposits in escrow, so his claim for unjust enrichment also fails as a matter of law.

Finally, we reject Fizer's other arguments as being without merit. As the district court did not err in granting summary judgment to respondents, we affirm the district court's order.[8]

It is so ORDERED.



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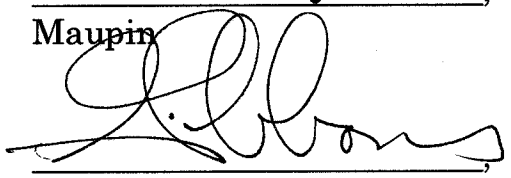

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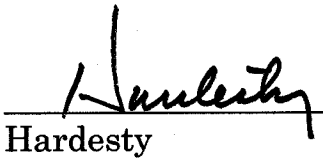

_____, J.
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cc: Hon. Nancy M. Saitta, District Judge
Stephen E. Haberfeld, Settlement Judge
Christensen Law Offices, LLC
Morris Pickering & Peterson/Las Vegas
Clark County Clerk

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[8]We note that section 36 of the purchase agreement provides for reasonable attorney fees and costs to the prevailing party. Fizer does not argue on appeal that the district court erred in awarding $366.71 in costs as part of its summary judgment order. His docketing statement included an unfiled opposition to respondents' motion for $13,170 in attorney fees, but Fizer did not provide an order regarding fees, nor did he appeal from any post-judgment order regarding attorney fees. Therefore, the issue of attorney fees is not properly before this court, and the award of costs is affirmed.

We decline to impose sanctions as requested by respondents in their answering brief.